

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, DC 20463

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FIRST GENERAL COUNSEL'S REPORT

MURs: 6781, 6786, 6802

DATE ACTIVATED: July 2, 2014

EXPIRATION OF SOL: August 21, 2018 (earliest)
On-going (latest)

ELECTION CYCLE: 2014

MUR: 6781

DATE COMPLAINT FILED: February 11, 2014

DATE OF NOTIFICATIONS: February 18, 2014

LAST RESPONSE RECEIVED: April 17, 2014

COMPLAINANTS:

Erin Hiller in her official capacity as Executive Director
and Stephen Gold in his official capacity as General
Counsel of ActBlue, LLC

RESPONDENT:

National Republican Congressional Committee and
Keith Davis in his official capacity as treasurer

MUR: 6786

DATE COMPLAINT FILED: February 21, 2014

DATE OF NOTIFICATIONS: February 26, 2014

LAST RESPONSE RECEIVED: June 24, 2014

COMPLAINANT:

James Schroeder in his official capacity as Chairman
Atlantic County Democratic Committee

RESPONDENTS:

National Republican Congressional Committee and
Keith Davis in his official capacity as treasurer

Frank LoBiondo

Frank LoBiondo for Congress and Nancy Watkins in
her official capacity as treasurer

MUR: 6802

DATE COMPLAINT FILED: March 27, 2014

DATE OF NOTIFICATIONS: April 2, 2014

LAST RESPONSE RECEIVED: May 21, 2014

COMPLAINANTS:

Campaign Legal Center
Democracy 21

RESPONDENT:

National Republican Congressional Committee and
Keith Davis in his official capacity as treasurer

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30102(e)(4)¹
52 U.S.C. § 30120(a)
52 U.S.C. § 30124(b)
11 C.F.R. § 102.14

INTERNAL REPORTS CHECKED: Disclosure reports

AGENCIES CHECKED: None

I. INTRODUCTION

The Act and the Commission's implementing regulations prohibit an unauthorized political committee from using in its name the name of any candidate — except in the title of a special project or communication if that title clearly shows opposition to the candidate. The Complaints in these three matters allege that when the National Republican Congressional Committee and Keith Davis in his official capacity as treasurer (the "NRCC") included candidate names without showing opposition to those candidates in the web addresses, page titles, and banner titles of approximately 35 websites, most of which solicit contributions for the NRCC, it violated section 30102(e)(4) (formerly section 432(e)(4)) of the Act and section 102.14 of the Commission's regulations.

The NRCC, through its counsel, submitted a similar Response in each matter. The Responses argue that the websites have no titles, and that there is no Commission precedent to support a particular interpretation of what constitutes a special project or website's "name" or "title." The Responses further contend that because the websites' content clearly attacks the named candidate, the websites fall under the opposition exception at 11 C.F.R. § 102.14(b)(3).

The NRCC's claim that its websites have no "titles" is mistaken. Indeed, the HyperText Markup Language ("HTML") code for each of the relevant websites specifically designates a

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

1 title for each website, which appears at the top of the browser window and on the browser tab,
2 and is used by search engines to populate results of search requests. Also, the NRCC
3 misconstrues the regulatory exception that permits an unauthorized committee to use a
4 candidate's name in the name of its special projects. That exception deals expressly with the title
5 of a special project, not its content, and applies only where a special project's title clearly reflects
6 opposition to the named candidate, regardless of the project's content. Accordingly, we
7 recommend that the Commission find reason to believe that the NRCC violated 52 U.S.C.
8 § 30102(e)(4) (formerly 2 U.S.C. § 432(e)(4)) and 11 C.F.R. § 102.14. We also recommend that
9 the Commission enter into pre-probable cause conciliation with the NRCC.

10
11 The Complaint in MUR 6786 also alleges that in 14 websites relating to William Hughes,
12 the NRCC fraudulently solicited contributions in violation of 52 U.S.C. § 30124(b) (formerly
13 2 U.S.C. § 441h(b)).² The NRCC's Response argues that there is no violation; the NRCC
14 operates the websites in its own name, and the websites carry the required disclaimers that
15 identify the NRCC as the entity paying for the website and the recipient of any contributions
16 made through the site. Because the disclaimers included on the NRCC's websites comply with
17 the Act, the presence of those disclaimers weighs against finding that the NRCC fraudulently
18 misrepresented that it solicited funds on behalf of Hughes. We therefore recommend that the

² In addition, the Complaint in MUR 6786 alleges that the NRCC violated 15 U.S.C. § 1125(d) by establishing a web domain in bad faith with the intent to deceive visitors to the website. Because the Commission does not have jurisdiction over Title 15 of the United States Code, we do not address that allegation here.

The Complaint in MUR 6786 also names as Respondents Frank LoBiondo and LoBiondo for Congress and Nancy Watkins in her official capacity as treasurer (collectively, the "LoBiondo Respondents"), but does not allege any violation of the Act by the LoBiondo Respondents. The LoBiondo Respondents assert in their Response that the Complaint is legally deficient as to them, because it fails to allege any violation by the LoBiondo Respondents. LoBiondo Resp. at 1 (Apr. 16, 2014). Because the record here does not suggest that the LoBiondo Respondents may have violated the Act in connection with the allegations in the Complaint, we recommend that the Commission find no reason to believe that the LoBiondo Respondents violated the Act, and close MUR 6786 as to them.

Commission find no reason to believe that the NRCC violated 52 U.S.C. § 30124(b) (formerly 2 U.S.C. § 441h(b)).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Starting in August 2013, the NRCC launched approximately 35 “attack microsites” — websites that attacked at least 19 candidates and nearly all of which solicited contributions for the NRCC.⁴ Each website has a title encoded into the site. HTML is the standard “language” used to create web pages, and its elements form the basis of all websites.⁵ HTML was used to create the attack microsites. The HTML “<title>” element defines the title of the webpage — it defines a title in the browser toolbar, provides a title for the page when it is added to a list of “favorites” in the browser, and displays a title for the page in search engine results.⁶ A single title element is required in all HTML documents; if the website’s code omits the title element, the document will not validate as HTML.⁷ Search engines, such as Google, separately index the HTML title element and appear to assign separate weight to it in ranking search results.⁸ While the title is clearly visible to any webpage visitor by the words at the top of a browser window or

³ NRCC Resp., MUR 6781 at 3 (Apr. 17, 2014); NRCC Resp., MUR 6786 at 3 (June 24, 2014); NRCC Resp., MUR 6802 at 3 (May 21, 2014).

⁴ See Compl., MUR 6781 at App. A, C (Feb. 11, 2014); NRCC Resp., MUR 6781 at App. A; Compl., MUR 6786 at Ex. A (Feb. 21, 2014); NRCC Resp., MUR 6786 at Ex. A; Compl., MUR 6802 at Ex. 1 (Mar. 27, 2014); NRCC Resp., MUR 6802 at Ex. A.

⁵ <http://en.wikipedia.org/wiki/HTML>.

⁶ http://www.w3schools.com/tags/tag_title.asp.

⁷ *Id.*

⁸ See *Search Engine Optimization Starter Guide* at 4, GOOGLE, <http://static.googleusercontent.com/media/www.google.com/en/us/webmasters/docs/search-engine-optimization-starter-guide.pdf> (last visited Oct. 24, 2014) (“If your document appears in a search results page, the contents of the title tag will usually appear in the first line of the results”).

- 1 on a tab within the browser, a visitor can also use the browser to access the website's source
- 2 code and review the HTML title element.⁹

- 3 The titles for at least 32 of the "attack microsites" referenced in the Complaints include
- 4 the name of a candidate, almost always with the phrase "for congress."

Website Address	Title
https://www.nrcc.org/martha-robertson-congress/contribute/	Martha Robertson for Congress
https://www.nrcc.org/ann-kirkpatrick-congress/contribute	Ann Kirkpatrick for Congress
http://www.billhughesjrforcongress.com/	Bill Hughes for Congress
http://www.billhughes4congress.com	Bill Hughes for Congress
http://www.billhughesforcongress.com	Bill Hughes for Congress
http://www.billhughesjr4congress.com	Bill Hughes for Congress
http://www.billhughesjr4nj.com	Bill Hughes for Congress
http://www.billhughesjr4nj.com	Bill Hughes for Congress
http://www.hughes4nj.com	Bill Hughes for Congress
http://www.hughesfornj.com	Bill Hughes for Congress
http://www.hughesjr4congress.com	Bill Hughes for Congress
http://www.hughesjrforcongress.com	Bill Hughes for Congress
http://www.williamhughes4congress.com	Bill Hughes for Congress
http://www.williamhughesforcongress.com	Bill Hughes for Congress
http://www.williamhughesjr4congress.com	Bill Hughes for Congress
http://www.williamhughesjrforcongress.com	Bill Hughes for Congress
http://ronbarber2014.com	Ron Barber for Congress
http://johnbarrow2014.com	John Barrow for Congress
http://seaneldridgeforcongress2014.com	Sean Eldridge for Congress
http://annkirkpatrick.com	Ann Kirkpatrick for Congress
http://annickusterforcongress.com	Annie Kuster for Congress
http://johnlewis4congress.com	John Lewis for Congress
http://nanypelosi2014.com	Nancy Pelosi for Congress
http://collinpetereson2014.com	Collin Peterson for Congress
http://nickrahallforcongress.com	nickrahallforcongress.com
http://domenic-recchia.com	Dominic Recchia for Congress
http://renteria4congress.com	renteria4congress.com
http://martha-robertson.com	Martha Robertson for Congress
http://andrewromanoff2014.com	Andrew Romanoff for Congress
http://sheaporterforcongress.com	Carol Shea-Porter for Congress
http://sinemaforcongress.com	Kyrsten Sinema for Congress
http://john Tierney2014.com	John Tierney for Congress

- 5 It appears that three websites, <http://contribute.sinkforcongress2014.com>,
- 6 <http://sinkforcongress2014.com>, and <http://parrish4congress.com>, were taken down when Alex

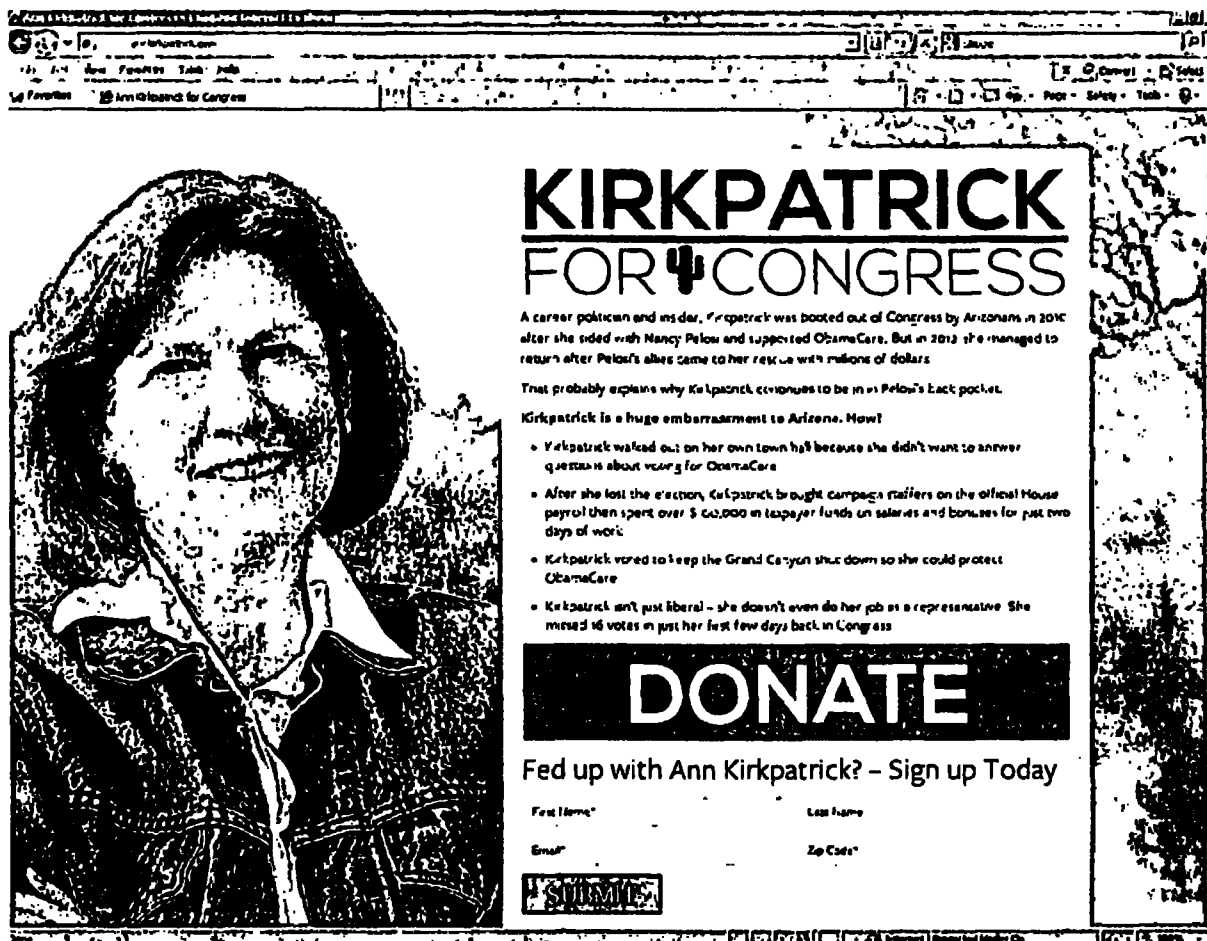
⁹ For example, in Microsoft's Internet Explorer internet browser, the source code can be viewed for a particular page by selecting "Source" from the "View" menu while on that page. Similarly, in Google's Chrome internet browser, the source code can be viewed by selecting "View Source" from the "Tools" menu, or by pressing Ctrl + U while on the page.

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1 Sink and Mike Parrish withdrew from their respective elections and ceased to be candidates. The
2 source code for these websites is no longer available. An image of
3 <http://contribute.sinkforcongress2014.com>, included as Exhibit C to the Complaint in
4 MUR 6781, however, includes "Alex Sink for Congress – Contribute" at the top of the browser
5 window and on the browser tab, which indicates that the NRCC or its agents selected "Alex Sink
6 for Congress – Contribute" as the HTML title for the page. Because nearly all of the NRCC's
7 other attack microsites used in their titles a candidate's name with the phrase "for congress," it is
8 likely that <http://sinkforcongress2014.com> and <http://parrish4congress.com> also used the
9 candidate's name in their titles. Finally, another website, [https://www.nrcc.org/krysten-sinema-](https://www.nrcc.org/krysten-sinema-congress/contribute/)
10 [congress/contribute/](https://www.nrcc.org/krysten-sinema-congress/contribute/), redirects to <https://www.nrcc.org/contribute/>, whose title does not include a
11 candidate's name.

12 The design of each attack microsite is similar. As in "Ann Kirkpatrick for Congress," a
13 screenshot of which is provided in Figure 1, below, the titles of the attack microsites appear in
14 the upper left corner of the browser window, as well as on the browser tab.

Figure 1. — Screen Capture of Ann Kirkpatrick for Congress Attack Microsite¹⁰



Aside from the websites relating to Bill Hughes, all of the websites at issue here include at the top a large banner in a bright, colored typeface, with the candidate's name and the phrase "for congress," superimposed upon a large photograph of the candidate. The attack microsites for Bill Hughes have just below "HOME" and "CONTRIBUTE" buttons at the top of the website a large, bright banner that reads, "NEED TO GET OUT OF JAIL? 'Better Call Bill!' BILL HUGHES JR. BILLHUGHESJRFORCONGRESS.COM." The banner is superimposed upon a large photograph of a man's hands in handcuffs. Below the banners on all of the attack microsites, the websites include various negative statements about the named candidate. A few

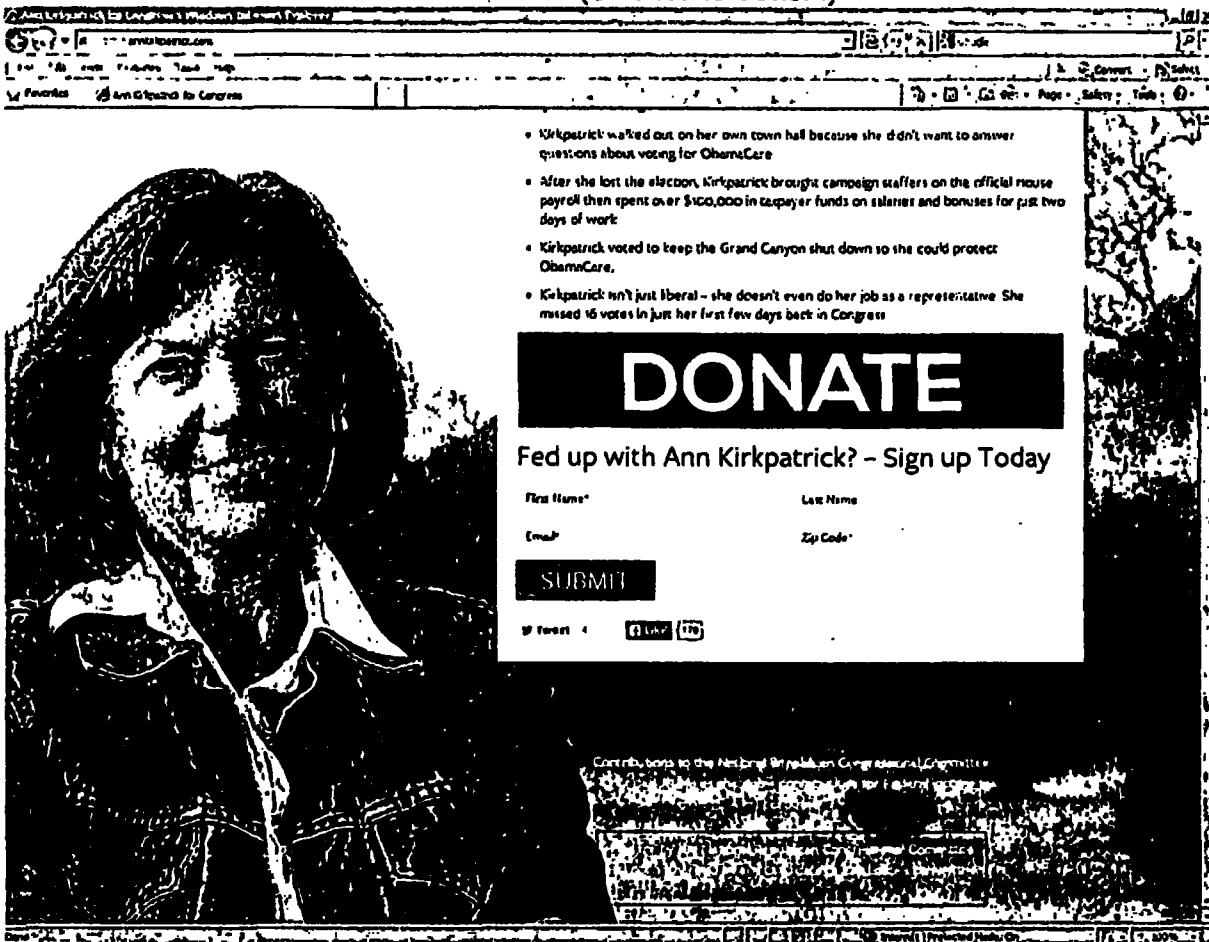
¹⁰ See <http://annkirkpatrick.com>.

1 of the websites include video clips attacking the named candidate. With the exception of
2 "renteria4congress.com," it appears that all of the attack microsites solicit a donation or
3 contribution to the NRCC.

4 In addition, as shown in Figure 2, below, all of the websites appear to include a statement
5 that, "Contributions to the National Republican Congressional Committee are not deductible as
6 charitable contributions for Federal income tax purposes" at the very bottom of the page, in small
7 font in a contrasting color. Immediately below that statement, in a separate box, a disclaimer
8 appears that the NRCC paid for the website, and that the website is not authorized by any
9 candidate or candidate's committee, along with the NRCC's web address. That text appears in
10 the same size and color as the statement regarding contributions. As Figure 2 reflects, these
11 disclaimers are positioned outside the typical viewing pane of the website on a computer
12 monitor¹¹ unless the visitor resizes the viewing window or scrolls the textual overlay to the
13 bottom of the page.

¹¹ In at least some instances — for example, on a smartphone screen — all of the text is displayed without requiring the viewer to scroll down.

Figure 2. — Screen Capture of Ann Kirkpatrick for Congress
Attack Microsite (Scrolled to Bottom)¹²



B. Legal Analysis

1. The NRCC's Attack Microsites Use Candidates' Names in Their Titles in Violation of the Act

The Act prohibits an unauthorized committee from including the name of any candidate in its name.¹³ Commission regulations further explain that a committee's "name" includes any

¹² See <http://annkirkpatrick.com>.

¹³ 52 U.S.C. § 30102(e)(4) (formerly 2 U.S.C. § 432(e)(4)) ("In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name."). The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's authority to interpret the prohibition at 2 U.S.C. § 432(e)(4) (recodified at 52 U.S.C. § 30102(e)(4)) on the use of a candidate's name in the name of an unauthorized committee as applying only to the name under which the committee registered with the Commission. See *Common Cause v. FEC*, 842 F.2d 436 (D.C. Cir. 1988).

1 name under which a committee conducts activities, such as solicitations or other
2 communications, including a special project name or other designation.”¹⁴ The Commission has
3 stated that the purpose of the prohibition on unauthorized committees’ use of candidate names in
4 their names is to “minimiz[e] the possibility of fraud and abuse” that may occur when an
5 unauthorized committee raises funds through such activities, including special project names, on
6 behalf of itself rather than the named candidate.”¹⁵

7 The Commission’s regulations, however, allow unauthorized committees to use a
8 candidate’s name “in the title of a special project name or other communication if the title clearly
9 and unambiguously shows opposition to the named candidate.”¹⁶ This exception to the
10 prohibition of the use of a candidate’s name is permitted because the risk of a committee
11 fraudulently misleading donors to believe that they are giving money to support the named
12 candidate is “significantly reduced” where the project title clearly and unambiguously opposes
13 the named candidate.”¹⁷

14 a. The NRCC Is Prohibited From Using Candidates’ Names in the
15 Titles of Its Special Projects

16 That the NRCC is a qualified party committee, not the authorized committee of any
17 candidate, and is therefore prohibited from using candidates’ names in the names of its
18 communications or projects is undisputed. The NRCC, however, argues that its use of
19 candidates’ names in its attack microsites was permissible because there is no “name” or “title”

¹⁴ 11 C.F.R. § 102.14(a). This regulation arose out of the Commission’s concern “over the possibility for confusion or abuse inherent” in the interpretation upheld in *Common Cause*. See Explanation and Justification for Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees, 57 Fed. Reg. 31,424, 31,424 (July 15, 1992) (“1992 E&J”).

¹⁵ 1992 E&J at 31,425.

¹⁶ 11 C.F.R. § 102.14(b)(3).

¹⁷ Explanation and Justification for Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees 59 Fed. Reg. 17267, 17269 (Apr. 12, 1994) (“1994 E&J”).

1 of the project, contends that its attack microsites are conducted in the NRCC's own name, and
2 disputes that the websites constitute "special projects" under the Act.¹⁸

3 These arguments are wide of the mark. Neither the Act nor the Commission's
4 regulations define "name" or "title." Yet the fact that each of the NRCC's solicitation websites
5 has an objectively defined title undermines its claim that the project has no title.¹⁹ Just as no
6 book is published without a title on its cover, spine, or title page — and traditionally all three
7 places — so that the book can be identified in a catalogue or on a shelf, similarly, no website is
8 published without the HTML title element that defines the title of the website in search results,
9 favorites menu, and various places in the browser window. Although the title is embedded in the
10 website's HTML code, it is readily visible to all visitors to the website, whether on the top of the
11 browser window or in the browser's tab, and is the name of the website that viewers click if they
12 searched for the site, rather than navigating directly to the website's URL.

13 In addition, the manner chosen to depict the message on each website further reflects that
14 the "title" of each website includes a candidate's name. Essentially the same information that the
15 NRCC or its agents specified as the title element of the HTML code for each website also
16 appears as the leading text on the face of each website, set above and in larger size and
17 prominence than the other textual content of each page — a traditional compositional method for
18 designating the title of textual materials, including campaign advertisements. To suggest that
19 these websites do not fall within the prohibition because they lack a "title" therefore stands at

¹⁸ NRCC Resp., MUR 6781 at 11-13; NRCC Resp., MUR 6786 at 7-9; NRCC Resp., MUR 6802 at 21-23.

¹⁹ In addition, the uniform resource locator ("URL") — the web address of each attack microsite — chosen by the NRCC or its agents for each solicitation at issue here also includes the name of a federal candidate without showing clear and unambiguous opposition to that candidate. To the extent that the URLs further reflect the titles of the solicitations, those titles violate the Act. See MUR 6399 (Yoder for Congress), *infra* note 34 and the accompanying text.

odds with both the specific decision of the NRCC or its agents to encode the title of the websites using candidate names and the manner chosen to display the messages presented on the websites.

Ultimately, for the language of 11 C.F.R. § 102.14 to have effect, the terms "name" or "title" must be evaluated according to reasonable, objective criteria rather than defined *post hoc* by the unauthorized committee. Otherwise, any unauthorized committee could simply claim that its special projects or communications have no name or title — whatever language may appear on the face of the communication — just as the NRCC does here, to avoid liability under the Act. Such a construction would impermissibly read the prohibition against the general use of candidate names by unauthorized committees out of the Act and implementing regulations.²⁰

The language of 11 C.F.R. § 102.14(a) also makes clear that the term "name" extends beyond the registered name of the unauthorized committee itself, but rather includes also the names of its solicitations, other communications, special projects, and other designations. Here, the apparent titles of the attack microsites are distinct from the NRCC's name, and remain subject to the requirements of 11 C.F.R. § 102.14. Indeed, section 102.14 of the Commission's regulations would be rendered superfluous if an unauthorized committee could avoid liability under the Act merely by claiming, as the NRCC does, that it conducts all of its activity under its own name and no other where the relevant materials indicate otherwise.

²⁰ See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (rejecting interpretation that "would deprive [the provision] of all substantive effect, a result self evidently contrary to Congress' intent"); *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) ("This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless."); *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir. 1992) (rejecting Attorney General's interpretation of statutory provision because it would make provision "either superfluous or meaningless"); *Carus Chemical Co. v. EPA*, 395 F.3d 434, 440 (D.C. Cir. 2005) ("A challenge to an agency's interpretation of its own regulation . . . turns . . . on whether the agency has offered an explanation that is reasonable and consistent with the regulation's language and history." (emphasis added) (quoting *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 627 (D.C. Cir. 2000))).

1 Likewise, the NRCC cannot escape liability under the Act for its use of candidates'
2 names in the titles of the attack microsites merely by claiming that the websites are not a "special
3 project." The Commission stated in Advisory Opinion 1995-09 (NewtWatch) that "[t]he
4 operation of a World Wide Web site would be considered a project of the Committee" that is
5 subject to the naming requirements in 11 C.F.R. § 102.14.²¹ But the websites need not be
6 considered a "special project" to be subject to the requirements of 11 C.F.R. § 102.14 in any
7 event, as the provision covers solicitations as well as other communications and designations.²²
8 All but one of the attack microsites at issue solicit contributions and are therefore solicitations
9 subject to the requirements of 11 C.F.R. § 102.14, even if they were not construed as a "special
10 project."

11 For these reasons, then, the NRCC appears to be an unauthorized committee that used the
12 names of federal candidates in the titles of the 35 websites at issue here, each of which
13 constitutes a special project or solicitation of the NRCC, and we therefore recommend that the
14 Commission find reason to believe that the NRCC violated 52 U.S.C. § 30102(e)(4) (formerly
15 2 U.S.C. § 432(e)(4)) and 11 C.F.R. § 102.14(a).

16 b. The NRCC's Attack Microsites Do Not Qualify for the Exception
17 to the Prohibition on Unauthorized Committees' Use of
18 Candidates' Names in Their Special Project Titles

19 The NRCC's use of federal candidates' names in the titles of the attack microsites does
20 not qualify for exemption under 11 C.F.R. § 102.14(b)(3) because the titles do not clearly and
21 unambiguously state opposition to the named candidates. The NRCC's Responses argue that the

²¹ Advisory Op. 1995-09 (NewtWatch) at 6; *accord* Statement of Reasons of Comm'rs Hunter, McGahn, Petersen at n.16, MUR 6399 (Yoder for Congress) ("Advisory Opinion 1995-09 (NewtWatch), which OGC cites in its analysis, merely establishes that a website operated by an unauthorized committee can be considered a committee special project that is subject to the naming requirements in 11 C.F.R. § 102.14(b)(3).").

²² 11 C.F.R. § 102.14(a), (b)(3).

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1 content of the attack microsites is clearly designed to encourage defeat of the named candidates,
2 and therefore qualifies them for the opposition exception in 11 C.F.R. § 102.14(b)(3).²³ But
3 11 C.F.R. § 102.14(b)(3) deals exclusively with the title of a special project or communication,
4 and expressly provides, in its entirety, "[a]n unauthorized political committee may include the
5 name of a candidate in the *title* of a special project name or other communication if the *title*
6 clearly and unambiguously shows opposition to the named candidate."²⁴ The websites' content
7 is irrelevant to the exception analysis.²⁵ The titles of the attack microsites include the names of
8 federal candidates and appear to show support for those candidates. Indeed, all of the websites'
9 titles²⁶ include the phrase "for congress" — the embodiment of a show of support for a particular
10 candidate.²⁷

11 The NRCC recognizes that the Commission implemented 52 U.S.C. § 30102(e)(4)
12 (formerly 2 U.S.C. § 432(e)(4)) and 11 C.F.R. § 102.14 to address concern over the risk of
13 confusion or abuse inherent in an unauthorized committee's use of a candidate's name to raise
14 funds or disseminate information,²⁸ and argues that this risk is mitigated where the content of the
15 websites at issue show clear opposition to the named candidate.²⁹ Yet the NRCC's Responses
16 ignore the way in which the titles of the attack microsites — because they appear to show

²³ NRCC Resp., MUR 6781 at 8-9; NRCC Resp., MUR 6786 at 4; NRCC Resp., MUR 6802 at 18.

²⁴ 11 C.F.R. § 102.14(b)(3) (emphasis added).

²⁵ See 1994 E&J at 17,268-69 (because it addresses the concern over the possibility of confusion or abuse by an unauthorized committee, the ban on the use of a candidate's name in a special project applies specifically to the project's title and not to the body of the accompanying communication).

²⁶ See *supra* pp. 5-6.

²⁷ See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (including "Smith for Congress" as an example of express words of advocacy of election); see also 11 C.F.R. § 100.22 (same).

²⁸ 1992 E&J at 31,424.

²⁹ See NRCC Resp., MUR 6781 at 9-10; NRCC Resp., MUR 6786 at 5-6; NRCC Resp., MUR 6802 at 19-20 (quoting the 1992 E&J and the 1994 E&J).

1 support for the named candidate — breed precisely the confusion that those provisions were
2 meant to address.

3 Regardless of any potential confusion, however, limiting the Commission's evaluation to
4 the communication's title allows the Commission to implement a content-neutral, objective
5 standard. Such a standard is easier to enforce and does not implicate the First Amendment
6 concerns that the NRCC presented in its Responses.³⁰ This approach is therefore consistent with
7 the Commission's prior recognition that 11 C.F.R. § 102.14 "is narrowly designed to further the
8 legitimate governmental interest in minimizing the possibility of fraud and abuse in this
9 situation. . . . [And] the Court of Appeals has specifically stated that this new approach is a
10 reasonable interpretation of the statutory language."³¹

11 The NRCC's Responses also note that the Commission dismissed the Complaints in
12 MURs 6633, 6641, 6643, and 6645, involving unauthorized committee websites that purported to
13 support a federal candidate.³² The NRCC's reliance on the Commission's findings in those
14 matters is misplaced. There, the complainant did not allege that respondents violated 52 U.S.C.
15 § 30102(e)(4) (formerly 2 U.S.C. § 432(e)(4)) or 11 C.F.R. § 102.14, and the Commission did
16 not address respondents' use of a federal candidate's name in their websites, solicitations, and
17 communications. Respondents suggest further that the finding of the Commission in MURs
18 6633, 6641, 6643, and 6645 nonetheless should at least inform the resolution here, because the
19 regulatory premise for the provision that the Commission did address in those matters was

³⁰ See NRCC Resp., MUR 6781 at 14-16; NRCC Resp., MUR 6786 at 10-11; NRCC Resp., MUR 6802 at 24-25.

³¹ 1992 E&J at 31,425.

³² See NRCC Resp., MUR 6781 at 13-14; NRCC Resp., MUR 6786 at 8-10; NRCC Resp., MUR 6802 at 22-24.

1 similar to that here — namely, prevention of fraud or the danger of confusion.³³ Whatever their
2 general purpose, however, the two regulations differ in one significant respect: the regulation at
3 issue here expressly identifies the title of a project or solicitation as the relevant consideration,
4 while the regulation addressed in those prior MURs does not. That distinction is controlling.

5 Likewise, the titles of the attack microsites here are readily distinguished from those at
6 issue in MUR 6213 (DUMP REID PAC), the only matter in which the Commission has
7 previously concluded that a website using a candidate's name did not violate 2 U.S.C.
8 § 432(e)(4) (recodified at 52 U.S.C. § 30102(e)(4)) and 11 C.F.R. § 102.14(a).³⁴ In MUR 6213,
9 the Commission found that the use of U.S. Senator Reid's name in the website title

³³ See NRCC Resp., MUR 6781 at 14 (asserting that the intent behind 11 C.F.R. §§ 110.11, 110.16(b) and 102.14 is "entirely consistent"); NRCC Resp., MUR 6786 at 9-10 (same); NRCC Resp., MUR 6802 at 23-24 (same).

³⁴ We recommended that the Commission find reason to believe that Yoder for Congress violated 2 U.S.C. § 432(e)(4) (recodified at 52 U.S.C. § 30102(e)(4)) and 11 C.F.R. § 102.14 when it created and operated www.StephaneMoore.com, which included content in opposition to Stephane Moore, Yoder's opponent in the 2010 election for the Third Congressional District of Kansas. See First Gen. Counsel's Rpt., MUR 6399 (Yoder for Congress). We found that operation of the website constituted a special project, titled StephaneMoore.com. Although Commissioners Bauerly and Weintraub voted to approve our recommendations, Commissioners Hunter, McGahn, and Petersen dissented. See Cert. ¶ 1, MUR 6399 (Yoder for Congress); Apr. 26, 2011. Commissioner Walther did not vote. *Id.* The Commission subsequently voted 5-0 to close the file without making any findings. *Id.* ¶ 2.

In a Statement of Reasons, Commissioners Hunter, McGahn, and Petersen argued that because Yoder for Congress was Yoder's authorized campaign committee, and 2 U.S.C. § 432(e)(4) (recodified at 52 U.S.C. § 30102(e)(4)) and 11 C.F.R. § 102.14 deal only with unauthorized committees, there could be no reason to believe that Yoder for Congress violated the Act. Statement of Reasons, Comm'rs. Hunter, McGahn & Petersen at 2-4, MUR 6399 (Yoder for Congress). Commissioners Hunter, McGahn, and Petersen also stated that Advisory Opinion 1995-09 (New Watch) "establishe[d] that a website operated by an unauthorized committee can be considered a committee special project that is subject to the naming requirements in 11 C.F.R. § 102.14(b)(3)[,]" but that there is no Commission precedent to support that an unauthorized committee's web address constitutes the title of a special project. *Id.* at n.16. Instead, Commissioners Hunter, McGahn, and Petersen asserted that the website's title "was the name that appeared at the top of the site" and that the name under which the committee conducted its website activities was the name on the disclaimers, not the website URL. *Id.*

Even if we use as the special project's title the name that appeared at the top of the website instead of either the HTML title element or the URL, the titles of the websites at issue here still improperly use a federal candidate's name without showing opposition to the named candidate in violation of 52 U.S.C. § 30102(e)(4) (formerly 2 U.S.C. § 432(e)(4)) and 11 C.F.R. § 102.14.

1 "www.dumpreid.com" was permissible because the website was a special project whose title³⁵
2 was clearly and unambiguously in opposition to Senator Reid.³⁶

3 2. The Record Does Not Provide a Reasonable Basis to Believe that the
4 NRCC Made Fraudulent Misrepresentations in Violation of 52 U.S.C.
5 § 30124(b) (formerly 2 U.S.C. § 441h(b))

6 The Complaint in MUR 6786 alleges that through its solicitation of donations via the
7 various websites relating to Bill Hughes, including www.billhughesjrforcongress.com, the
8 NRCC fraudulently misrepresented itself as speaking on behalf of Hughes.³⁷ Although the
9 NRCC's Response does not directly address the alleged violation of 52 U.S.C. § 30124(b)
10 (formerly 2 U.S.C. § 441h(b)), it argues that its Hughes websites are less susceptible to fraud
11 because they are clearly in opposition to Hughes.³⁸

12 Section 30124(b)(1) (formerly section 441h(b)(1)) of the Act and section 110.16(b) of the
13 Commission's regulations provide that "[n]o person shall fraudulently misrepresent the person as
14 speaking, writing, or otherwise acting for or on behalf of any candidate or political party or
15 employee or agent thereof for the purpose of soliciting contributions or donations[.]" But
16 "[e]ven absent an express misrepresentation, a representation is fraudulent if it was reasonably
17 calculated to deceive persons of ordinary prudence and comprehension."³⁹ For example, in

³⁵ DUMP REID PAC identified www.dumpreid.com as its special project. The Commission accordingly accepted that representation without engaging in any further analysis of what constituted the title of a special project under 11 C.F.R. § 102.14.

³⁶ See Factual and Legal Analysis at 3-4, MUR 6213 (DUMP REID PAC). The Commission also exercised its prosecutorial discretion and dismissed the complaint against DUMP REID PAC for using Senator Reid's name in an acronym in the PAC's name. Cert. ¶ 1, MUR 6213 (DUMP REID PAC), Apr. 27, 2010.

³⁷ Compl. at 3-5, MUR 6786.

³⁸ NRCC Resp. at 9-10, MUR 6786.

³⁹ *FEC v. Novacek*, 739 F.Supp.2d 957, 961 (N.D. Tex. 2010). Cf. *United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing, *inter alia*, *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (holding that in a scheme devised with the intent to defraud, the fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the scheme)).

1 MUR 5472 (Republican Victory Committee, Inc.), the Commission found that respondents
2 knowingly and willfully violated section 441h(b) (recodified at section 30124(b)) of the Act
3 because their telephone and mail solicitations contained statements that, although making no
4 expressly false representation, falsely implied that respondents were affiliated with or acting on
5 behalf of the Republican Party.⁴⁰ In MUR 5472, the respondent had stated in its direct mailings:
6 "Contributions or gifts to the *Republican Party* are not deductible as charitable contributions."⁴¹
7 A reasonable person reading that statement, which directly addresses the effect of the donation,
8 would have believed that the Republican Victory Committee, Inc. was soliciting contributions on
9 behalf of the Republican Party.⁴²

10 Although the record leaves little doubt that the NRCC uses Hughes's name in the titles of
11 websites that seek donations to the NRCC, we cannot agree with the complainant in MUR 6786
12 that this conduct constitutes a fraud within the reach of the Act or Commission regulation. The
13 solicitations themselves are made expressly on behalf of the NRCC, not Hughes. The
14 Commission has previously acknowledged that the presence of an adequate disclaimer
15 identifying the person or entity that paid for and authorized a communication suggests that a
16 respondent did not harbor the requisite intent to deceive for purposes of a violation of section
17 30124(b) (formerly section 441h(b)) of the Act.⁴³ Here, the NRCC includes an adequate

⁴⁰ See Cert. ¶ 1, MUR 5472 (Republican Victory Committee, Inc.), Jan. 31, 2005; First Gen. Counsel's Rpt. at 8, MUR 5472 (Republican Victory Committee, Inc.).

⁴¹ First Gen. Counsel's Rpt. at 9, MUR 5472 (Republican Victory Committee, Inc.) (quoting direct mailings from Republican Victory Committee, Inc.) (emphasis added).

⁴² *Id.*

⁴³ See MURs 6633 (Republican Majority PAC), 6641 (CAPE PAC), 6643 (Patriot Super PAC), 6645 (Conservative Strikeforce) (Commission found no reason to believe that respondents violated 2 U.S.C. § 441h (recodified at 52 U.S.C. § 30124) where respondents included a disclaimer and other references to themselves on websites that appeared to support Allen West, but solicited funds on respondents' behalf); MUR 2205 (Foglietta) (Commission found no reason to believe that respondents violated 2 U.S.C. § 441h (recodified at 52 U.S.C. § 30124) where respondents included a disclaimer on advertising material that altered opponent's disclosure reports

1 disclaimer on its websites that indicate that the NRCC — and not a federal candidate —
2 authorizes the solicitations. Even though they appear at the foot of the websites, the disclaimers
3 are immediately adjacent to the donation link and are sufficiently clear and conspicuous to “give
4 the reader . . . adequate notice of the identity of the person or political committee that paid for
5 and, where required, authorized the communication.”⁴⁴ In addition, that the websites’ content
6 here plainly reflects opposition to Hughes would further suggest to a reasonably prudent person
7 that Hughes would not receive a contribution through the websites.

8 Nor is there any indication that the NRCC sought to conceal its activities in connection
9 with the websites. The NRCC is registered with the Commission and complies with its reporting
10 requirements, including disclosure of its expenditures and disbursements.

11 We therefore recommend that the Commission find no reason to believe that the NRCC
12 violated 52 U.S.C. § 30124(b) (formerly 2 U.S.C. § 441h(b)) or 11 C.F.R. § 110.16(b). Whether
13 the NRCC’s conduct is prohibited by 15 U.S.C. § 1125(d) or other laws beyond the Act is not a
14 matter within the Commission’s jurisdiction.

and made unsubstantiated negative statements); MURs 3690, 3700 (National Republican Congressional Committee) (Commission found no reason to believe that respondents violated 2 U.S.C. § 441h (recodified at 52 U.S.C. § 30124) where disclaimer disclosed that respondents were responsible for the content of negative satirical postcards that appeared to be written by opposing candidate and committee). Cf. MUR 5089 (Tuchman) (Commission found reason to believe that a violation of section 441h (recodified at section 30124) of the Act occurred where disclaimer was included only on envelope of solicitation letter because letter itself appeared to come from an entity affiliated with the Democratic Party).

⁴⁴ 11 C.F.R. § 110.11(c)(1) (“A disclaimer is not clear and conspicuous if it is difficult to read . . . or if the placement is easily overlooked.”); *see also* 52 U.S.C. § 30120 (formerly 2 U.S.C. § 441d) (describing required disclaimers). But the disclaimer need not appear at the top or front of the page, so long as appears within the communication. 11 C.F.R. § 110.11(c)(2)(iv). In previous matters, the Commission has dismissed allegations of inadequate disclaimers, even where a communication or solicitation lacked a disclaimer. *See, e.g.*, MUR 6270 (Rand Paul Committee) (Commission dismissed matter where communication lacked disclaimer, but included sufficient information for recipients to identify the payor); MUR 6278 (Joyce B. Segers) (Commission dismissed under the Enforcement Priority System a matter where committee failed to include disclaimer on campaign materials but public could reasonably discern from their contents that committee produced the materials and the committee took remedial action); *but see* MUR 6348 (David Schweikert for Congress) (Commission failed by vote of 3-3 to approve Office of General Counsel’s recommendations to find reason to believe that committee violated 2 U.S.C. § 441d(c) (recodified at 52 U.S.C. § 30120(c)) and 11 C.F.R. § 110.11(c) because disclaimer on mailer was not in sufficient contrast or set apart from rest of text to be clear and conspicuous).

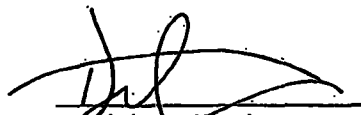
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V. RECOMMENDATIONS

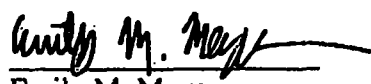
1. Find reason to believe that the National Republican Congressional Committee and Keith Davis in his official capacity as treasurer violated 52 U.S.C. § 30102(e)(4) (formerly 2 U.S.C. § 432(e)(4)) and 11 C.F.R. § 102.14.
2. Find no reason to believe that the National Republican Congressional Committee and Keith Davis in his official capacity as treasurer violated 52 U.S.C. § 30124(b)(1) (formerly 2 U.S.C. § 441h(b)(1)).
3. Find no reason to believe that Frank LoBiondo and LoBiondo for Congress and Nancy H. Watkins in her official capacity as treasurer violated 52 U.S.C. §§ 30102(e)(4), 30124(b)(1) (formerly 2 U.S.C. §§ 432(e)(4), 441h(b)(1)) and 11 C.F.R. § 102.14, and close the file in MUR 6786 as to them.
4. Approve the attached Factual and Legal Analysis.
5. Enter into conciliation with the National Republican Congressional Committee and Keith Davis in his official capacity as treasurer, prior to a finding of probable cause to believe.
6. Approve the attached conciliation agreement.

7. Approve the appropriate letters.

10/28/14
Date


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Associate General Counsel


William A. Powers
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Emily M. Meyers
Attorney

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